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No. 87-106

In The

Supreme Court of the United States

October Term, 1986

GEORGE T. HART, *et al.*,

Petitioners,

vs.

JACINTO ZAMORA,
Executor of the Estate of Jacinto Clark Zamora, Deceased,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

David I. Kelvin
209 Faull Avenue
Ukiah, CA 95482
(707) 463-2422

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Should certiorari be granted to resolve a dispute between two Circuit Courts which in no way involves the present case?

2. Is a police officer entitled to good faith immunity if he disarms a person he has arrested, shoots him in the head, and then alters the evidence to make it appear that the shooting was in self-defense?

3. Can summary judgment be opposed on the strength of circumstantial evidence, or is only direct evidence sufficient?

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Respondent respectfully prays that the petition for writ of certiorari herein be denied, and the decision of the United States Court of Appeal for the Ninth Circuit entered in the above entitled action on February 26, 1987

be allowed to stand. In support thereof, the following argument is respectfully submitted.

———o———

STATEMENT OF THE CASE

On June 28, 1982, Jacinto Clark Zamora, (hereinafter referred to as Zamora), was shot to death in his living room by three Oakland Police Officers who were attempting to detain him for psychiatric treatment. Zamora had been in a motorcycle accident several years before in which he sustained brain damage. Thereafter, he often acted irrationally, but had no criminal record of any nature at the time of his death. (Clerk's Transcript, document 133, pp. 1-2).

The police were summoned to Zamora's home by a black neighbor, who complained that Zamora had called him a nigger, and cursed him while holding a bow, but no arrows, in his hand. (Clerk's Transcript, document 97, exhibit 4). The officers who responded were also black. They met Zamora on the porch of his house. He told them they were taking the side of the neighbor because they were niggers, cursed them, and ordered them off his property. (Clerk's Transcript, document 97, exhibit 6). The officers testified that Zamora was armed with a machete during this conversation, but several neighbors who observed it testified that Zamora was unarmed. (Appendix to Petition, page A-27).

The officers retired across the street to digest this hospitable reception, at which time a sergeant arrived on the scene. The sergeant, who was white, advised the black

officers that he had dealt with Zamora in the past and knew him to be crazy. He further advised them that it would not be a good idea to arrest Zamora. (Clerk's Transcript, document 97, exhibit 8). Nevertheless, after the sergeant departed, petitioners Young, Drummer, and Rice rushed onto Zamora's porch to arrest him. Zamora retreated into his house. The officers forced their way in behind him. Shortly thereafter, three shots rang out. When petitioners emerged, Rice had a stab wound in the fatty part of his back. Zamora lay dead on his living room floor with a bullet in his brain.

Petitioners are the only living witnesses to the events inside Zamora's house. They testified that, once inside, Zamora confronted them with a machete. They turned to run, but Zamora inflicted a stab wound in Rice's back. They then turned to face Zamora, and after he did not heed a warning, Rice shot him. Standing alone, this testimony would be conclusive that petitioners acted in self-defense, and are not liable for Zamora's death. The physical evidence raises disturbing questions, however.

The photographs of the scene taken by police investigators depict a scene that even the trial judge called dramatic. (Appendix to Petition, page A-36). Zamora has a machete in his hand, a pair of nunchakus in his belt, and a pair of needlenose pliers lie nearby on the floor. A criminalist who examined these photographs testified that the location of bloodstains in the room was inconsistent with the police version of events. (Clerk's Transcript, document 99, page 2). More significantly, a doctor employed by the San Francisco Coroner's office testified that after being shot, Zamora would have dropped

the machete from his hand. (Clerk's Transcript, document 110, exhibit S).

Based on this evidence, respondent contends that the machete was placed in Zamora's lifeless hand by petitioners, who manipulated the scene to support their claim of self-defense. He further contends that petitioners had no grounds to arrest Zamora in the first place, but intended to obtain retribution for the verbal abuse they had received from him. They certainly prevailed in this attempt, but in the process, violated the civil rights of Zamora by subjecting him to excessive force in the course of an unreasonable, warrantless arrest. There are clearly triable issues of fact to be resolved by a jury, and the Court of Appeals properly reversed and remanded for trial. As hereinafter appears, certiorari is not appropriate herein, and respondent respectfully submits that said petition should be denied.

ARGUMENT

I

THE CONSTITUTIONALITY OF CALIFORNIA'S PSYCHIATRIC DETENTION STATUTE IS NOT AT ISSUE HEREIN

To justify an involuntary detention for psychiatric treatment, it is not sufficient that the person detained be mentally ill. He must in addition be dangerous to himself or others. *O'Connor v. Donaldson,* 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). There is a difference of opinion among the several Circuits of the Court of

Appeal as to whether the person detained must commit overt acts of violence in order to justify the detention. In *Suzuki v. Yuen,* 617 F.2d 173 (9th Cir. 1980), the Ninth Circuit held a Hawaii statute unconstitutional for not requiring overt acts. In *Project Release v. Prevost,* 722 F. 2d 960 (2d Cir. 1983), the Second Circuit held constitutional a New York statute that did not have this requirement.

While this dispute might be interesting from an academic standpoint, it in no way affects the present case. This is clear, as the opinion of the Court of Appeal herein expressly states the constitutional issue is not reached. (Appendix to Petition, page A-50, footnote 2). The California statute is of the type that does require overt acts *People v. Triplett,* 144 Cal.App.3d 283, 192 Cal.Rptr. 537 (1983). There is simply a factual dispute between the parties as to whether Zamora committed such overt acts prior to the attempted detention. This Court is not the appropriate forum to resolve factual disputes.

The District Court readily disposed of this dispute by disregarding the testimony of respondent's witnesses that Zamora was unarmed when he talked with the officers outside his house. (Appendix to Petition, page A-27). This was error, as upon a motion for summary judgment, the trial judge may not weigh conflicting evidence. *Anderson v. Liberty Lobby,* — U.S. —, 106 S.Ct. 2505, — L.Ed. — (1986). The reversal by the Court of Appeals was accordingly proper. Were the parties hereto in agreement as to the underlying facts, but disagreed as to the constitutional requirements of psychiatric detention statutes, the conflict between *Suzuki* and *Project Release*

might be of some significance. As it is, however, all that is necessary is a jury to determine the true facts.

Petitioner's strategy in raising this conflict is plain. They wish to clear the hurdle presented by Rule 17 of the Rules Of The Supreme Court, which provides that Certiorari is not a matter of right, but discretionary upon the existence of certain grounds. One such ground is to resolve a conflict between two Circuit Courts. But this case in no way involves such a conflict. The only question presented regarding psychiatric detention is whether facts existed to justify such detention. There is no dispute as to the standard to be applied to such facts.

Were this Court to rule herein on the Constitutional standards for psychiatric detention, such rule would be dictum, as the issue is simply not presented. The Court might with equal logic use this case to decide the right to abortion or the limits of the exclusionery rule. Petitioners have stated no grounds for granting certiorari, and respondent respectfully submits that their petition should be denied as a result.

II

GOOD FAITH IMMUNITY DOES NOT APPLY TO THE FACTS OF THIS CASE

Petitioners contend the summary judgment herein may be upheld on a theory of good faith immunity, citing *Anderson v. Creighton,* 55 U.S.L.W.5092 (U.S. June 25, 1987). *Anderson* is readily distinguishable from the present case. In *Anderson,* an action for damages for violation of civil rights was based upon the warrantless search of a home. No one was injured in the search, which was

apparently mistakenly made in the wrong house. This Court quite properly held that if the officer had a reasonable belief his search was permissible, he was immune from liability.

In the present case, there are conflicting versions of the facts, which must be resolved at trial. If it is found that petitioners' version is true, then they clearly acted in self-defense, and are not liable on a section 1983 action. *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). If respondents version is determined to be true by a finder of fact, petitioners attempted to cover up the wrongful shooting death an unarmed man by deliberately falsifying the evidence. They could not base a good faith immunity defense on such facts.

Good faith immunity exists where an official acts with a reasonable, albeit mistaken, belief that he is within the law. Where the official knows he is violating someone's civil rights, he is not acting in good faith.

> Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury. . . ." *Harlow v. Fitzgerald,* 457 U.S. 800, 815, 73 L.Ed.2d 396 (1982).

The issue in this case is black and white, if a pun may be interjected into such a serious matter. The police either acted properly in self-defense, or killed Clark Zamora without justification, and then tried to cover it up. Under neither theory could they have had a mistaken but rea-

sonable belief that their actions were constitutional. Either they weren't mistaken, but correctly believed they were using only reasonable force, as defined in *Garner*, or knew they were using excessive force at the time. *Anderson* is accordingly not applicable herein, and petitioners' claim of good faith immunity must fail. Respondent therefore respectfully submits that this petition for certiorari should be denied.

III

RESPONDENT IS ENTITLED TO THE BENEFIT OF ALL REASONABLE INFERENCES THAT MAY BE DRAWN FROM THE EVIDENCE

Petitioners contend that unless respondent produces some direct evidence to contradict the officers' testimony, they are entitled to summary judgment. This suggestion cannot be taken seriously. It carries with it the abolition of circumstantial evidence. Of course the law is entirely to the contrary. Summary judgment may be opposed by inferences that may be reasonably drawn from the evidence, and such inferences must be viewed in the light most favorable to the party opposing the motion. *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

Naturally, only reasonable inferences may be drawn from the evidence. *Harvey v. Great Atlantic & Pacific Tea Co.*, 388 F.2d 123 (5th Cir. 1967). That was the problem confronting the plaintiff in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. —, 106 S.Ct. —, 89 L.Ed.2d 538, 54 U.S.L.W. 4319 (1986). In *Matsushita*, there was no direct evidence of the trade conspiracy upon which plaintiff sought recovery. Plaintiff

sought to infer this conspiracy from the business practices of the defendants, but such inference could not reasonably be drawn from these practices, which if anything, supported an inference that no conspiracy had occurred. *Matsushita* is readily distinguishable from the present case, as the reasonable inferences that may be drawn from respondent's evidence support a finding of excessive force used by petitioners.

Charles Morton, a forensic scientist, testified that the location of the bloodstains in Zamora's living room was inconsistent with the officers' version of events. The only reasonable inference to be drawn from this fact is that officers' version is not accurate. In his deposition, Dr. Jose Ferrer, M.D., testified that he had observed at least twenty cases of persons shot in the head while holding a weapon, and in each case they dropped the weapon after being shot. He never observed a case where the weapon was retained. (Clerk's Transcript, document 110, exhibit S). He further testified that to a reasonable medical probability, under no circumstances could Zamora have retained the machete in his hand. Yet the police photograph shows the machete in his hand after death. The only reasonable inference that may be drawn from this evidence is that the machete was placed in Zamora's hand by one of the officers. Respondent defies petitioners to suggest any other inference, reasonable or otherwise, that may be drawn from this evidence. As it is not necessary to make something look like what it already is, because petitioners tried to make it look like Zamora was killed in self-defense, the inescapable conclusion is that his death was anything but.

The trial judge avoided this conclusion only by rejecting the testimony of Dr. Ferrer. (Appendix to Petition, page A-42, footnote 9). It is blackletter law, however, that the court may not weigh the credibility of witnesses upon a summary judgment motion. *Neely v. St. Paul Fire and Marine Insurance Co.*, 584 F.2d 341 (9th Cir. 1978). The trial judge further erred when he concluded that Dr. Ferrer must be wrong, unless officer Rice inflicted his own stab wound. Of course respondent is suggesting no such thing. Because Zamora stabbed officer Rice, however, it is not a necessary conclusion that he was killed in self-defense. He could have been disarmed and then shot, or have inflicted the stab wound in a futile defense of his own life against three heavily armed and evilly disposed police officers.

It must not be forgotten that Zamora had used against petitioners the insult most highly offensive to a black man, that he was of a different ethnic group than them, and that his group and theirs have not always peacefully coexisted. That petitioners were angry with Zamora is not unlikely. That they shot him is not disputed. By itself, this would not support a judgment that they did not act in self-defense, but when coupled with the facts that they are not telling the truth about events in Zamora's house, and that they placed a weapon in his hand after he was dead, respondent has produced considerably more evidence than the plaintiff in *Matsushita*.

This is a case that requires a jury to determine the facts. The jury must be permitted to view the officers demeanor as they testify, and to reach a decision as to their credibility as well as that of the expert witnesses. Only

then will the facts surrounding Zamora's death be conclusively established. Summary judgment was not intended to be a substitute for trial. *Whitaker v. Coleman,* 115 F.2d 305 (5th Cir. 1940). The District Court erred when it entered summary judgment on the evidence below, and the Court of Appeals properly reversed that judgment. Respondent therefore respectfully submits that the petition for certiorari herein be denied.

Date: August 12, 1987

DAVID I. KELVIN, Attorney
For Respondent